89-1568

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR CHAMBLESS and
MILDRED H. CHAMBLESS,

Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,

Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit impermissibly abrogated the district court's discretion in reversing an actuarial adjustment of a pension benefit that had been granted to remedy discriminatory and confiscatory conduct intended to penalize older employees and interfere with the attainment of their vested pension benefits, when the district court found that without such a remedy the underlying intention of its earlier rulings would be thwarted.

2. Do lower "small to medium firm" rates for prevailing counsel, and the refusal to consider as relevant the rates of other lawyers with larger firms in the same community, or the rates, time and billing practices used by opposing counsel in the same case, violate

the standards established by prior decisions of this Court in cases involving the award of attorney's fees?

3. Does a purported adjustment of a fee award for the delay factor that does the reverse of what it is supposed to do, and conflicts with the methods customarily used for making such adjustments approved by this Court, together with the arbitrary exclusion of large blocks of time, and the denial of any fee on an appeal in which plaintiffs prevailed on a significant issue, violate the "fully compensatory fee" requirement?

LIST OF PARTIES TO PROCEEDING BELOW

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Petitioners,

v.

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHLER, Administrators of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT L. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRY L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C. SCOTT, CAPT. JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEL SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WHITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pension Plan,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Arthur Chambless and Mildred H. Chambless, plaintiffs in the proceedings below, respectfully pray that a writ of certiorari issue to review (i) the judgment and decision of the Court of Appeals for the Second Circuit entered in this case on September 12, 1989, and (ii) the order of the United States Court of Appeals for the Second Circuit dated March 14, 1990 (denying petitioners' application for attorney's fees on the appeal).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported as Chambless v. Master, Mates and Pilots Pension Plan, 885 F.2d 1053 (2d Cir. 1989), is set forth in the Appendix at pages (A-1-17).[1] The opinions of the United States District Court for the Southern District of New York are found at A-28 and A-44. The former decision is also reported at 697 F. Supp. 642 (S.D.N.Y. 1988); the earlier decision is unreported. The order of the United States Court of Appeals for the Second Circuit dated March 14, 1990 (denying petitioners' application for attorney's fees on the appeal) is found

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[1]Citations preceded by "A-" refer to the Appendix to the Petition for Certiorari which is filed herewith by petitioners Arthur and Mildred Chambless. Citations preceded by "AA-" refer to the Joint Appendix filed in the Court of Appeals.

at A-134-136.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1989. (A-21.) The order denying plaintiffs' petition for rehearing was entered on February 8, 1990. (A-20.) The order denying petitioners' application for attorney's fees on the appeal was entered on March 14, 1990. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, 1002, 1053(a), 1104(a), 1105, 1132(a) and (g), and 1140.

STATEMENT OF THE CASE

This case involves the legal standards applicable to the review of a remedy granted by the district court for pension rights that were found to have been confiscated in part as a result of discrimination and punitive misconduct by a union-sponsored pension plan and its trustees, and for the determination of recoverable attorney's fees.

Specifically, the plaintiffs are Captain Arthur Chambless and his wife, Mildred H. Chambless. Captain Chambless spent his life at sea in the United States Merchant Marine, working up to the position of "Master," or captain, the highest officer in command of ocean-going vessels.

Captain Chambless, after sailing for over 33 years, filed an application for retirement in 1977. Captain Chambless

was pressured to do this by the union. Chambless was told that the union wanted all of the older licensed deck officers to retire, and that if he did not do so, he would be forced to ship out in second or third mate assignments rather than in the Master's position. The pension plan informed Captain Chambless that his benefits would be $920 per month if he retired at that time, in 1977. (A-123.)

Later, when Captain Chambless informed the Pension Plan that he also was now sailing in competitive employment under another labor contract in reliance on advice given him by a union agent, in order to provide for the medical expenses of his seriously ill wife, he was told that his pension benefit would be suspended for 10 years and even then paid at the reduced level of only $470 per month, contrasted with the $920 per

month to which he was entitled in 1977. (A-125.)

The district court held that due notice of the changes in the pension plan had not been given, and that the suspension and reduction in benefits was punitive, discriminatory, arbitrary and capricious, and a nullity. (A-128-133.)

However, the district court did not fix the precise amount of the remedy. (A-119-120.) In response to plaintiffs' motion, the district court declined to do so in view of the filing of a notice of appeal by the pension plan defendants. The district court stated, "My opinion did not contemplate pension benefits for Captain Chambless retroactive to 1977. Mr. Garfield's approach was not considered. If this matter is appealed, plaintiff would be advised to raise those questions on appeal. In-

deed, it probably would be prudent on plaintiff's part to cross-appeal." (A-115-116.)

On appeal, the Court of Appeals "affirmed the decision of the district court in all respects" and remanded the case "for a determination of the benefits which Chambless would have received in 1977." (A-114.)

A class action against the same pension plan was pending in the United States District Court for the Middle District of Florida, Tampa Division, (Deak v. Masters, Mates and Pilots Pension Plan, No. 79-190 (M.D. Fla. June 4, 1984). Captain Chambless was not a member of that class because of certain differing issues involved. The district court in the Deak case also held that the Pension Plan's Trustees had breached their fiduciary duties, a decision that

has been affirmed on appeal. Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572 (11th Cir.), cert. denied, __ U.S.___, 108 S.Ct. 698 (1988).

On the remand of the Chambless case, the district court refused to grant attorney's fees to the prevailing party, Chambless. (A-85-90.) This issue then was appealed to the Court of Appeals of the Second Circuit which reversed and held that Chambless was entitled to attorney's fees as the prevailing party. (A-76-84.)

Again on remand, the district court awarded to Captain Chambless the pension payments to which he would have been entitled on the basis of an application for pension in 1977, and at the same time the District Court granted an actuarial adjusted benefit to the pension payments based upon findings that

without such an adjustment a confiscatory effect would occur, and that the intention of the district court's earlier rulings would otherwise be thwarted. (A-69-70.)

In addition, the district court awarded to plaintiffs an attorney's fee based on a record and time sheets submitted by the attorneys specifying time spent on the case and the firm's historical billing rates. Plaintiffs' attorneys had voluntarily reduced the amount by 25% as being applicable to non-prevailing issues. However, the court reduced the amount arbitrarily by an additional 30%, arriving at a total of 55% reduction for time expended by plaintiffs' counsel. (A-56.)

The district court also ruled that services of law clerks and paralegals would be compensable only at payroll

cost rather than customary billing rates. (A-66-67.)

The district court declined to make an interest adjustment to adjust the "lodestar" rates for delay in payment. (A-32-33.)

While plaintiffs' fee application was pending, it was discovered that for the services of their counsel in the case, for the period through January 31, 1987, defendants had received more than $700,000 for attorney's fees and expenses plus interest in excess of $200,000 under an insurance policy. (A-169.) Since that is more than three years ago, it is estimated that defendants by now have received in the neighborhood of $1,500,000 from the insurance company for the services of their counsel.

These payments were approved under

an insurance policy that covered defendant's liability for counsel fees and expenses to both sides in this litigation. In other words, the insurance policy will cover plaintiffs' recoverable attorney's fees as well as the fees of defendants' counsel. This information came to light as a result of the decision in Sokolowski v. Aetna Life & Casualty Co., 670 Fed Supp. 1199 (S.D.N.Y. 1987).

In contrast to the considerable sums received for the services of defendants' counsel, plaintiffs were awarded $451,990.50 as prevailing or successful party to the litigation and for the same issues and work. (A-26.)

The district court's decision was appealed by the plaintiffs on the issues relating to attorney's fees and by defendants with respect to the actuarial

adjustment of the pension benefits of Captain Chambless.

The Court of Appeals for the Second Circuit reversed the district court with respect to the actuarial adjustment. (A-9-11.) The Second Circuit also reversed the decision limiting recovery for law clerks and paralegals to payroll costs in view of this Court's decision in Missouri v. Jenkins, ____ U.S. ____, 109 S.Ct. 2463 (1989) (A-12-13), and affirmed the decision on plaintiffs' attorney's fees in all other respects. (A-12.)

Subsequently, the Court of Appeals denied without explanation plaintiffs' application for attorney's fees in connection with the appeal. (A-134-136.)

Plaintiffs contend that this decision is contrary to Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), since their

"win" in obtaining a reversal of the district court on the issue of compensation for law clerks and paralegals was a significant achievement in the Second Circuit, and the litigation of the defendants' appeal regarding the remedy of the actuarial adjustment was fairly within the scope of their overall successful litigation of the issue relating to the discriminatory and punitive interference with the plaintiffs' pension rights by the defendants.

ARGUMENT

I. A FIRST-IMPRESSION ISSUE INVOLVING THE REMEDY OF AN ACTUARIAL ADJUSTMENT WARRANTS REVIEW

Presented as an issue of first impression is whether a district court has discretion to require an actuarial adjustment of a pension benefit in order to avoid a confiscation, and to remedy

discriminatory conduct intended to penalize older employees and interfere with the attainment of their vested pension benefits.

The district court found such an actuarial adjustment to be required; the Second Circuit reached the opposite conclusion and reversed the district court on that issue.

The district court stated:

> The issue presented is whether an actuarially adjusted pension would be the functional equivalent of an award of retroactive benefits. The court finds that it would not be. An award of retroactive benefits, by definition, would increase the total amount of benefits to which the court has found plaintiff entitled. The adjustment that plaintiff seeks, however, would not alter the total amount of pension benefits to which he is entitled over the course of his expected lifetime. It would merely recognize that that amount will now be payable over a shorter period of time. Thus, viewed from the perspective of his total projected lifetime benefits, the adjustment plain-

> tiff seeks would not increase his benefits. Nor would it place him at an advantage compared to similarly situated 1977 pensioners. It would merely enable him to remain on a par with those pensioners. (A-69; emphasis added.)

The district court also found that without such an actuarial adjustment, a confiscatory effect would occur, and the intention underlying its earlier rulings would be thwarted. It said:

> The court's earlier rulings guaranteed plaintiff a wage-related benefit based on his 1967-77 employment record. That intention would be thwarted if defendants were now permitted to diminish plaintiff's total projected benefits by denying the fact that payments did not commence until 1986. Previously, the court held that defendants had "not only suspended Chambless' rights to benefits until age 65 but [had] confiscated a considerable part of those benefits." Chambless, 602 F. Supp. at 911. It would avail plaintiff little for the court to have prevented that confiscation only to permit another confiscation now based on a different premise.
> (A-69-70; emphasis added.)

The prevention of such forfeitures is a principal reason for the enactment of ERISA. See, Lee, ERISA's "Bad Boy": Forfeiture for Cause in Retirement Plans, 9 Loy.U.Chi.L.J. 137 (1977).

In the view of the Second Circuit, the district court was not at liberty to make such further findings on the scope of the remedy required, but was constricted by the terms of the prior remand:

> [W]e earlier ruled that appellant was not entitled to recover retroactive benefits. On remand, the district court awarded appellant actuarially-adjusted benefits, which amounts to exactly the same thing... Because the district court upon remand bestowed retroactive benefits or their equivalent, that judgment must be reversed.
> (A-4, 9.)

The difficulty with this is twofold. First, to reach the conclusion that the district court's action was not within

the scope of the prior remand, the Second Circuit had to disregard the explicit contrary findings of the district court, and did so without applying the mandated "clearly erroneous" standard of review. See, e.g., Inwood Laboratories v. Ives Laboratories, 456 U.S. 856, 102 S.Ct. 2182 (1982).

Second, the Second Circuit purported to apply the terms of its remand to an issue that had never been determined on the trial of the case that led to the first appeal, but was explicitly left open by the district court for future determination.

Following the trial of the case, the district court made explicit findings concerning the illegal and punitive action and motive of the pension plan defendants, but the precise remedy was not specified by the judgment. (A-119-120.)

When plaintiffs made a timely post-trial motion on the subject of the remedy to be provided, the district court frankly acknowledged that it had not considered the matter, but advised the parties to proceed with the appeal on the merits since the pension plan defendants had already filed a notice of appeal. (A-115-116.)

The district court also advised Captain Chambless to await the outcome of the appeal before applying for pension benefits, and concluded by saying, "Whatever matters the court has to determine can await the remand of this case to this court." (A-116.)

Clearly, Captain Chambless was in a Catch-22 situation. If he resigned as a ship's Master in order to apply for a pension, he would be without any income or medical coverage for his wife's

severe illness without knowing what the outcome of the appeal would be.

The district court's endorsement order also stressed that it had not considered or decided the issues presented by plaintiff's post-judgment motion to amend, including the issue of retroactivity or "Mr. Garfield's approach." (A-115-116.)

Subsequently, in the second appeal, the Second Circuit reinforced the view that the matter had not been previously decided. The Second Circuit acknowledged that plaintiffs' post-judgment motion had not been decided, and suggested that it might have been previously regarded as premature:

> It appears that Chambless did not actually apply for his pension until August 5, 1986; payments to him commenced as of September 1. The district court's final decision not to amend the judgment came on August 20, 1986--before Chamb-

> less began receiving benefits. Therefore, any claim by Chambless that the monthly benefit he would receive would be inadequate could have been properly denied as premature. To that extent, we affirm the refusal of the district court to amend its judgment. However, Chambless is now concededly receiving approximately $920 a month. Any claim that this sum fails to include required cost-of-living adjustments and related claims that he is not receiving, or has not received, the monetary benefits to which he is entitled under the Plan may now be presented to the district court. Upon such presentation, our prior mandate in this case requires the district court to determine whether Chambless is now receiving benefits in the amount to which he is entitled.
> (A-84; emphasis added.)

Since the Second Circuit acknowledged in the Second Appeal that the matter had never been decided, its subsequent treatment of the issue on the third appeal as if, in fact, it had been decided on the first appeal was inconsistent with the Second Circuit's own

prior decision on the subject by a different panel.

In this respect, the Second Circuit's decision is also inconsistent with decisions on the law of the case doctrine in other circuits. Chapman v. National Aeronautics and Space Administration, 736 F.2d 238 (5th Cir. 1984), cert. denied, 469 U.S. 1038, 105 S.Ct. 51 (1984), holds that its prior ruling that plaintiff had stated a "redressable violation" did not foreclose the subsequent district court decision of no liability following remand. Since the issue of intent, had not been previously considered, the district court was entitled to examine the issue.

As stated in 1B Moore's Federal Practice ¶ 0.404[10]:

> In the case of a remand for further proceedings, the mandate constitutes the law of the case only on such issues of law as

> were actually considered and decided by the appellate court, or necessarily to be inferred from the disposition on appeal.

In the present case, the Second Circuit stated in the second appeal that "...[w]e remanded the case to the district court to determine 'the benefits which Chambless would have received in 1977.'" (A-84) The court further stated that since Chambless had not begun receiving retirement benefits as of the time the district court denied his motion to amend the judgment, "any claim by Chambless that the monthly benefit he would receive would be inadequate could have been properly denied as premature." (A-84; emphasis added.)

The Second Circuit further declared that any claims Chambless had concerning the inadequacy of his pension benefit

> "...may now be presented to the district court. Upon such presentation, our prior mandate in

> this case requires the district court to determine whether Chambless is now receiving benefits in the amount to which he is entitled." (A-84)

Thus, consideration of that issue could not have been foreclosed by the law of the case.

The fact that the amount which Captain Chambless was entitled to receive was not an issue previously determined is further shown by the language of the initial judgment itself, which does not specify the amount that Captain Chambless is to receive other than specifying that "the trustees will treat the application [of Captain Chambless for a pension] for the purpose of calculating his wage-related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record." (A-119), and in which the district court specifi-

cally retained jurisdiction" for the purpose of enforcing the judgment and making such further orders as are necessary." (A-120)

The district court did what the Second Circuit said to do in its second remand. For it now to be held by a separate panel to have violated the terms of the first remand in doing so presents a situation rife with confusion and prejudice.

The mischief created by this is shown by the district court's decision below. The district court stated that its "earlier rulings guaranteed plaintiff a wage-related benefit on his 1967-77 employment record. That intention would be thwarted if defendants were now permitted to diminish plaintiff's total projected benefits by denying the fact that payments did not commence until

1986." (A-69; emphasis added.)

The district court's "earlier rulings," of course, were the rulings that the Second Circuit explicitly stated it had affirmed in the first appeal ("we affirm the decision of the district court in all respects"). (A-114.) Thus, for a different panel in a subsequent appeal to treat the results of the prior affirmance as an occasion for restricting the remedy to be provided, thus "thwarting" the original intention of the district court, is impermissibly circular.

It is the function of the district court to fashion the remedy on the facts and law as established at the trial. The role of the appellate court, with respect to the remedy, when it affirms the district court's decision on the merits, is circumscribed.

The substantive significance of this issue is shown by the district court's finding that without an actuarial adjustment, a confiscatory effect would occur. The district court stated:

> Previously, the court held that defendants had "not only suspended Chambless' rights to benefits until age 65 but [had] confiscated a considerable part of those benefits." Chambless, 602 F. Supp. at 911. It would avail plaintiff little for the court to have prevented that confiscation only to permit another confiscation now based on a different premise. (A-70; emphasis added.)

The issue for which review is sought therefore involves not only the delineation of the proper roles of the trial and appellate courts, but also an important issue of substantive law as well.

The fundamental purpose of ERISA was to prevent confiscation of pension benefits. The confiscation which the district court found here to have occurred

was especially heinous because it was the outgrowth of self-dealing by the trustees of the union-sponsored pension plan for bad motives: to discriminate against and to punish Captain Chambless by severely restricting his pension rights in furtherance of union politics. (A-130-132.)

For a judicial system that has produced such findings after extended litigation now to say that the plaintiffs are not to receive the remedy necessary to obviate that confiscatory effect is to raise a serious question whether such a result is not contrary to the expressed will of Congress in enacting ERISA.

District courts have broad discretion to fashion equitable remedies as needed to implement the purposes of ERISA. As stated in Katsaros v. Cody,

744 F.2d 270, 271, cert. denied, 469 U.S. 1072 (1984), "it is well-settled that ERISA grants the court wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries...."

Here, the district court made a specific factual finding that an actuarially-adjusted pension is not the "functional equivalent of retroactive benefits." It further found that without such an adjustment, the earlier decision on the merits would be "thwarted," and plaintiff's benefits would be confiscated, in part, as a result of the discriminatory wrong-doing of defendants. (A-69-70)

Although the Second Circuit's opinion fails to address the issue of what deference was given to the district court's findings, the result indicates

that, in fact, no deference was given.

Yet it was the district court that tried the case, and it was the district court that made the initial determinations that were affirmed on appeal.

Further, it was the district court that considered the relevant facts relating to the necessity of such an actuarial adjustment as a remedy on the basis of plaintiffs' motion to amend the judgment.

Courts of Appeals have limited functions. They do not decide factual issues de novo or determine appropriate remedies on the facts as found. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). Although a Court of Appeals might reach a different result by giving the facts a different construction or resolving ambiguities differently, its function is

not to set aside a determination by the district court absent clear error. United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 495-96; Zenith Radio, 395 U.S. at 123.

This Court has repeatedly declared that "[i]n reviewing the factual findings of the District Court, the Court of Appeals [is] bound by the "clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure. Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855, 102 S.Ct. 2182, 2189 (1982).

In Inwood, the Court also stated that "[b]ecause of the deference due the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been commit-

ted,' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.746 (1948), it must accept the trial court's findings." Id., at 2189. (Emphasis added.)

In Anderson v. City of Bessemer City, 470 U.S. 562, 105 S.Ct. 1504 (1985), this Court considered the practice in some appellate courts, including the Second Circuit, of exercising de novo review over findings not based on credibility. Criticizing a leading Second Circuit decision, Orvis v. Higgins, 180 F.2d (2nd Cir. 1950), the Court rejected such de novo review, holding that: "review of factual findings under the clearly erroneous standard--with its deference to the trier of fact -- is the rule, not the exception." Anderson, 470 U.S. at 581.

Amadeo v. Zant, 486 U.S. 214

(1988), involves a habeas corpus petition that had been denied on appeal, remanded and granted, and denied a second time on appeal. The Court noted that "without examining the record or discussing its obligations under Rule 52(a), the [appellate] court simply expressed disagreement and substituted its own factual findings for those of the District Court," and reversed. Id. at 1777.

Although the Court observed that there was significant evidence in the record to support the findings favored by the Court of Appeals, it declared: "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (Id. at 1778; emphasis added.)

In the present case, there is a complete absence of any discussion by the

Second Circuit of the appellate court's obligations under Rule 52(a). There is, however, a substitution of inconsistent findings for those of the district court.

The proper delineation of the responsibilities of the appellate and district courts in this area warrants the Court's attention, especially in view of the nature of the remedy involving an actuarial adjustment.

The use of actuarial adjustments is a standard practice in the pension field.

The Department of Labor specifically provides for actuarial adjustments in circumstances analogous to the present case and clearly does not share the Second Circuit's view that an actuarial adjustment is identical to a retroactive benefit.

The Department of Labor Preamble to the ERISA regulations indicates that an actuarial adjustment is required when pension benefits are suspended to an early retiree in order to compensate for the temporary withholding of the pension benefit. Such an actuarial recalculation is required, according to the Department of Labor, in order to maintain "the integrity of the actuarial equivalent of the normal retirement benefit." 3 Prentice-Hall Pension and Profit Sharing Service ¶ 90334, pp. 90762-3.

The use of an actuarial adjustment is also approved in the statutory language of ERISA. ERISA defines "accrued benefit" and states "that if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [as is here the case]...the employee's

accrued benefit ... shall be the actuarial equivalent of such benefit ...." (29 U.S.C. § 1054(c)(3); emphasis added.)

An actuarial adjustment also is within the equitable powers of the courts to provide a remedy for violations of Section 510 of ERISA. Section 510 makes it unlawful to "discriminate against a participant for the purpose of interfering with the attainment of any right to which such participant may become entitled ... (29 U.S.C. § 1140; emphasis added.)

In such a case of discrimination and illegal interference with the attainment of pension rights, as the district court found to have occurred here, it is submitted that an actuarial adjustment is required to provide equity. See, Rev. Rul. 81-140, 1981-1 Cumulative Bulletin

180.

The Second Circuit's reversal of an actuarial adjustment, therefore, is inconsistent with modern pension practice as well as the equitable powers of the district courts to remedy intentional interference with the attainment of pension benefits.

The Second Circuit's refusal to defer to the findings and decision of the district court on the remedy necessary to obviate a confiscatory effect on plaintiff's pension rights based upon affirmed findings of culpable misconduct on the part of defendants herein therefore presents a substantial issue in the administration of justice worthy of this Court's attention.

II. THE DISCRIMINATION BETWEEN "LITTLE FIRM" VERSUS "BIG FIRM" RATES VIOLATES BLUM v. STENSON

The decisions below relegated plaintiffs' counsel to a special category of small or medium-sized law firms and used lower lodestar rates on the assumption (not supported by the record) of lower overhead costs. (A-59.)

It is submitted that limiting plaintiffs' counsel to small firm rates, and refusing even to consider the "big firm" rates and the billing practices of opposing counsel in the same case, violates Blum v. Stenson, 465 U.S. 886 (1984).

The bedrock of legal representation in this country long has been predominantly the independent lawyer practicing alone or in a relatively small law firm.

It always has been, and still is, the individual solo practitioner or law-

yer in a small firm who has been willing to be an advocate for the rights of the individual with limited resources in disputes with large corporations or governmental units; it always has been, and still is, the lawyer in a firm small enough in which his professional judgment can be given effect who has been willing to undertake the commitment that such cases entail; it always has been, and still is, the lawyer in the small firm who has been willing to stand up and battle against the victims exploited by "The Curse of Bigness."[2]

The lawyers who perform this important service should not be treated as second class citizens when it comes to making determinations under fee-shifting statutes.

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[2]Louis D. Brandeis, THE CURSE OF BIGNESS (New York: Viking Press, 1934).

Otherwise, economic considerations will accelerate the mega-firm trend toward largeness, weakening still further the capacity and willingness of individual lawyers to exercise true professional independence in the representation of clients and causes.

The availability of judicial remedies in civil litigation will become even more restricted to those with large financial resources, such as the pension plan defendants in this case.

A. The Limitation to Small Firm Rates Conflicts with Blum v. Stenson

The purported justification for the double standard used by the district court was a case decided by the same judge involving a non-profit law office, Huertas v. East River Housing Corp., 662 F. Supp. 282, 286 (S.D.N.Y. 1986), vacated on other grounds, 813 F.2d 580 (2d Cir. 1987). (A-59.)

The district court was of the view that smaller offices or firms have lower overhead costs, and therefore may only recover lower fees. (A-59.)

However, Blum v. Stenson, 465 U.S. 886 (1984) mandates the use of "prevailing market" rates, and rejects a cost-based standard in determining them.

In affirming the district court, the Second Circuit said (885 F.2d at 1058-1059):

> Chambless argues that the district court violated this mandate when it set the hourly rates for the lodestar calculation by reference to small to medium-sized firms. We do not think the above-quoted language from Blum v. Stenson compels district courts to assign the same hourly rate to every law firm in the same city. On the contrary, under the Blum v. Stenson formulation, the district court must ascertain whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Id. at 986 n.11,

> 104 S.Ct. at 1547 n.11 (emphasis added). Thus, as the district court implicitly recognized, several market rates may prevail in a given area, particularly one with as large and diverse a legal community as New York City. (Emphasis in original.)

It is submitted that the question of whether several or many market rates may be considered to "prevail" in a given case, depending on the size and nature of the law firm involved, should be addressed by this Court. Otherwise, proceedings on attorney's fee applications will be converted into antitrust-style inquiries into the existence of markets and sub-markets and what rates "prevail" in them.[3]

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[3]The Second Circuit's opinion erred in stating that an article from the Manhattan Lawyer was the primary evidence proffered by plaintiffs on prevailing hourly rates in New York City. On the contrary, a showing of the billing rates of a number of New York law firms was presented with the showing with the affidavit of Edgar Pauk, Esq., attorney for the plaintiffs (footnote continued)

The conundrum posed by the Second Circuit's decision is shown by the question of what will be used as the "prevailing rate" in the next case in which

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in Miele v. New York State Teamsters Conf. Pension & Retirement Fund, 831 F.2d 407 (2d Cir. 1987), involving the lodestar rates for attorneys in the New York City area who have the specialized experience desirable to litigate complex ERISA issues.

The degree to which this fee information is probative is shown by the fact that it was found to be acceptable in the Miele case before the Second Circuit, and relied upon by that same Court in the rendering of its decision in that case.

Referring to this fee information, specifically that portion dealing with mid-1982, the average lodestar rate for the high partners listed for this period was $247.00

This is in sharp contrast to the lodestar rate of $175.00 assigned by the district court to the senior attorney for plaintiffs' counsel during what is termed "Phase I" of the period of the case. A similar disparity exists in making comparisons between what was shown by the survey and what was allowed by the court below.

a small, non-profit law office is the fee applicant. Will the rates of the larger law firms again be excluded because the office is smaller or non-profit?

The relevant factors listed for consideration in the opinion in Blum v. Stenson -- "similar service by lawyers of reasonably comparable skill, experience, and reputation" (465 U.S. at 695-6, n.11) -- notably exclude any mention of the size of the law firm.

The emphasis is upon the qualitative factors of skill, experience, and reputation of the lawyers involved and the similarity of the services involved in the case, not the size of the law firm.

Behind the name plates of the mega-firms are vast numbers of anonymous "scribblers" who will be ultimately discarded through the "up or out" process,

but whose time nevertheless is billed at "big firm" rates.

In addition, the failure to consider the billing rates used by large firms means that the lawyers who by and large do most of the ERISA work for the pension plans are automatically excluded as not relevant in an ERISA case.

B. Prejudice was Also Caused By the Refusal to Consider the Billing Practices of Opposing Counsel

It is submitted that consideration of rates actually charged in the market for lawyers' services in the same case is far more relevant (and fair) in a case with the complexity of this one than is conjecture about whether small firms in general have costs that are higher or lower than large firms.

However, the courts below ruled out any such consideration of opposing counsel's rates or time. (A-36; A-15.)

A large New York law firm represented the pension plan defendants in the present litigation.

Its bills were based upon "large firm" hourly rates that were not questioned, and were paid promptly when rendered without the deduction of large blocks of time depending on whether the lawyers in the firm won or lost on the precise issue presented. Litigation expenses were paid without being constricted to "costs."

When the time arrived for settling accounts with the insurance company that paid defendants' legal bills, defendants obtained reimbursement for virtually all of the fees and expenses paid in the amount of $786,702.98 through January 31, 1987, and undoubtedly substantially more since then (A-169) and in addition more than $200,000 in interest for the

delay factor. (AA-1018-19.)

The very same insurance policy also covers plaintiffs' fees in this litigation. Sokolowski v. Aetna Life & Casualty Co., 670 F. Supp. 1199 (S.D.N.Y. 1987).

The use of a double standard by self-dealing pension plan fiduciaries in opposing the computation of attorney's fees for the attorneys who expose their wrong-doing on the same basis that they themselves approved for their own counsel is impossible to justify.

During the course of the litigation, defendants were secure in the knowledge that their attorney's fees and expenses would be covered by an insurance policy. Thus they knew full well that they could pursue their tactics of litigation by attrition against Captain Chambless. No settlement was ever contemplated by de-

fendants because Captain Chambless was regarded as the quintessential "Bad Boy" by the segment of the maritime industry dominated by the union sponsoring the pension plan.[4]

The district court specifically found that (A-89-90):

> Defendants are surely guilty of bad faith. The Trustees of the Plan are union and employer representatives. Amendment 47, along with Amendment 46, was proposed in 1976 by the union representative trustees. The amendment was not proposed to protect the corpus of the pension fund or to further the interests of the plan participants. The principal purpose was to further union politics. Thus, there is culpability on the part of the Plan trustees.
>
> The plan can absorb an award of reasonable attorney's fees, and an award would act as a deterrent to future political manipulation of the Plan by either union or shipowner trustees. [Emphasis added.]

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[4]Lee, ERISA's "Bad Boy: Forfeiture for Cause in Retirement Plans, 9 Loy. U. Chi. L.J. 137 (1977)

Therefore, based on the district court's bad faith findings, attorney's fees would have been recoverable by plaintiffs even in the absence of a fee-shifting statute. See Perichak v. Int'l Union (Westinghouse Electric Corp.), 715 F.2d 78 (3d Cir. 1978).

The applicability of the principles of trust law to the fiduciary duties of the ERISA trustees has recently been confirmed by this Court, stating that the federal courts "are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" Firestone Tire & Rubber Co. v. Bruch, ___ U.S. ___, 109 S.Ct. 948, 954 (1989).

In this case, not only was there a breach of trust, but that breach of trust was found to have been committed for self-serving purposes on the part of the trustee-defendants of the union-

sponsored pension plan; their actions were found to have constituted culpable conduct in furtherance of union politics.

Explicit findings of confiscatory effect and the intentional imposition of a penalty by the pension plan as a means of discriminating against older licensed deck officers including the plaintiff were made. (A-129-130.)

Consideration therefore should be given to the question of whether defendants are estopped from contending that legal fees and expenses that they voluntarily invested in their meritless defense in this litigation, and approved as the basis of their claim under an insurance policy also applicable to plaintiffs, should not be used as a measure of what constitutes a reasonable measure of the attorney's fees and expenses al-

lowable to plaintiff.

The Circuits are divided on whether the fees, time and billing practices of opposing counsel are a relevant consideration in such cases.

See Guiliani, Note, Determining the Reasonableness of Attorneys' Fees - The Discovery Of Billing Records, 64 B.U.L. Rev. 241, 264 (1984), and cases discussed therein; In re First Peoples Bank Shareholders Litigation, 121 F.R.D. 219, 228 (D.N.J. 1988); Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552, 562-564 (N.D.Ga. 1979); Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1575 (11th Cir. 1985); Gaines v. Dougherty County Bd. of Educ., 775 F.2d 1565, 1571 n.12 (11th Cir. 1985).

In this case, as stated, opposing counsel's rates and billing practices are of particular significance because

of the existence of an insurance policy which covers the cost of counsel on both sides in this litigation.

Certiorari therefore should be granted to review the question of whether a double standard may be used to lower recovery for prevailing counsel in an ERISA case by (a) characterizing plaintiffs' law firm as small to middle-sized, and (b) refusing to consider the basis which the pension plan defendants accepted as satisfactory in compensating their own counsel in the same litigation.

III. A "DELAY IN PAYMENT" ADJUSTMENT HAVING THE REVERSE EFFECT VIOLATES THE REQUIREMENT OF A "FULLY COMPENSATORY" FEE

Throughout this litigation, plaintiffs consistently have sought an appropriate adjustment to reflect the delay in payment factor.

Plaintiffs' fee request was based upon historical hourly rates. Plaintiffs therefore requested that an interest factor be used in computing the fees because of the delay involved. (AA-552.)

As shown in the affidavit of plaintiffs' expert, such an adjustment was needed "to adjust the historical hourly rates used to the present time in order to assure that they represent the economic equivalent of what the fees would have been if payments were being made ... on a current basis." (Id.)

The district court acknowledged the possibility that plaintiffs might be entitled to interest "on that portion of the award for which historic rates were used." (A-63.)

However, the district court did not use an interest factor to adjust the

hourly rate even though the plaintiffs made a specific showing that historical rates were used as the basis for their application. (AA-543.)

Instead, the district court grouped the lodestar rate into two phases. Phase I was for the earlier period, 1979-82, and Phase II was for the 1983-87 "current" period. (A-60).

However, the two-phase approach used by the district court did the opposite of what it was supposed to do. Because lower rates were used for the earlier years, entailing a longer delay period, the problem of delay was exacerbated.

The consequence of the approach used by the district court is that, when the hourly rates used by the district court are adjusted to reflect their present economic value as of the time when services were performed, such rates clearly

are substantially below prevailing market rates used for complex ERISA litigation in New York City.[5]

Similarly, the district court failed

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[5]The analysis by plaintiffs' expert witness shows the difference in the nominal lodestar rates used by the district court for Phase I and the present value of the lodestar rates adjusted as if payment had been received on July 1, 1988, to be as follows:

Year Services Performed	District Court's Nominal Lodestar Rates	Lawyer	Effective Return on Lodestar Rates Adjusted to Present Value as of July 1, 1988
1979	$175	(Wisehart)	$68
1980	175	(Wisehart)	76
	125	(Friou)	54
	70	(Opsahl)	33
1981	175	(Wisehart)	84
	125	(Friou)	60
	70	(Opsahl)	34
1982	175	(Wisehart)	94
	70	(Opsahl)	37

to adjust for delay by using an interest factor with respect to recoverable litigation costs and expenses. The result is to give defendants a discount windfall when the amount received at the date of payment is compared with the present value of the dollars used at the time when the expenses were paid, going back over a period of more than ten years.

The decision in Missouri v. Jenkins, __ U.S. ____, 109 S.Ct. 2463 (1989), was announced nearly a year after the district court's decision, and after the appeal had been argued in the Second Circuit.

Missouri v. Jenkins states that an adjustment for delay in payment is appropriate because (109 S.Ct. at 2469):

> Clearly, compensation received several years after the services were rendered - as it frequently is in complex litigation - is

> not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. (Footnote omitted.)

The Second Circuit herein referred to the "or otherwise" language in the opinion in Missouri v. Jenkins as leaving broad discretion in the district court to determine the adequacy of adjustment for delay in payment. (A-16.)

The "or otherwise" phrase comes from the following sentence in Missouri v. Jenkins (id.):

> We agree, therefore, that an appropriate adjustment for delay in payment--whether by the application of current rather than historic rates or otherwise--is within the contemplation of the statute. [Emphasis added.]

When fairly read, the Jenkins opinion mandates a meaningful adjustment for delay, not one that, as the district court's herein, is worse than illusory.

The "or otherwise" clause in Missouri v. Jenkins should be read in the context of the Court's quotation with approval of the following language on the same subject from Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 716 (1987):

> In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value.

Thus, on two occasions this Court has referred to two methods "regularly recognized" as appropriate for making delay in payment adjustments when, as here, no interim fees have been allowed: "either [1] by basing the award on current rates or [2] by adjusting the fee based on historical rates to reflect its present value."

Essentially, the second method, the "present value" method, involves the inclusion of an interest factor, and the "or otherwise" language in Missouri v. Jenkins, in the context used in the opinion contemplated such a method as the alternative.

The district court's opinion suggests that the Second Circuit had rejected the two methods of fee adjustments approved in Missouri v. Jenkins, supra, in preference for the two phase approach. (A-60.) The Second Circuit made no comment about its view on the preferred method, and merely indicated that the method was discretionary with the district court. (A-16.)

Apparently the Second Circuit did not examine the opinion in Missouri v. Jenkins very carefully, and it seems clear that the approach followed in ad-

justing for delay in the Second Circuit should be made consistent with the methods used in other Circuits as approved in this Court's opinions.

Plaintiffs established by the affidavit of an expert witness that the two-phase approach used by the district court constituted economic nonsense (AA-1023-25, ¶¶2-4), rather than the "fully compensatory" standard that has been established for making such determinations. See Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

No countering affidavits on the subject were submitted by defendants.

As shown in the affidavit of plaintiffs' expert, the two-phase approach used below does not adjust for a ten-year delay in payment, but does the reverse, producing the paradoxical result that plaintiffs would have been better

off if no such adjustment had ever been made.

The district courts may "retain latitude in determining how they will compensate prevailing attorneys for delay" (A-16), but the latitude retained is not so broad as to justify failing to compensate for delay, and doing the reverse of what the objective is stated to be.

When what purports to be an adjustment for delay is instead the reverse, and what should be an equivalent of lodestar-compensation has been converted into a penalty making the effective hourly rates fall far below the prevailing market level required to yield a "fully compensatory" fee under this Court's prior decisions, Blanchard v. Bergeron, ___ U.S.___ , 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); Riverside v Rive-

ra, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d. 466 (1986); Blum v. Stenson, 465 U.S. 886 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), only confusion, prejudice and further litigation can result from such a precedent.

The issue therefore warrants the attention of this Court.

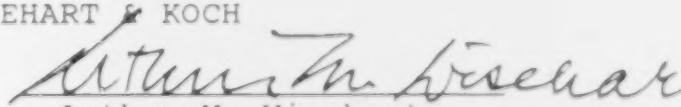
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to review the questions presented herein.

April 6, 1990

Respectfully submitted,

WISEHART & KOCH

By: 

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